Expanding Our Understanding of Narrowing Precedent

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Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 **Colum. L. Rev.** 1861 (2014).

Richard Re's recent essay, *Narrowing Precedent in the Supreme Court*, identifies and examines the judicial technique of narrowing precedent as a practice that is meaningfully distinct from other ways of dealing with precedent, such as distinguishing, following, and overruling. The essay is gracefully written, carefully argued, and generative of insights and additional arguments.

In Re's taxonomy of how courts use precedent, *narrowing* means "not applying a precedent when it is best read to apply." Thus understood, narrowing contrasts both with *following* precedent ("applying a precedent when it is best read to apply") and also with *distinguishing* precedent ("not applying a precedent where it is best read not to apply"). According to Re, narrowing is also distinct from *overruling*. Unlike the overruled precedent, the narrowed precedent remains available for future application, though within a narrower compass.

Everyone who has argued about the application of precedent in one form or another should already understand that courts often employ this "narrowing" technique. But by differentiating this technique from both "overruling" and "distinguishing," Re helpfully brings greater analytical clarity to discussions of the judicial treatment of precedent. By "hon[ing] the customary vocabulary that lawyers and judges use when discussing case law," Re convincingly shows that judicial narrowing at the Supreme Court is common, as well as often (though not always) legitimate. Re's analysis also rescues some of the Roberts Court's more controversial narrowing decisions from the charge of "stealth overruling."

Narrowing Precedent both prompts and channels careful thinking about the categories that we use for discussing how courts deal with judicial dispositions of prior cases. The essay invites further exploration of the complex legal relations that traffic under the familiar labels that judges and lawyers casually deploy in describing what they are doing with precedent.

One way of taking up that invitation is to begin with a question about why we might want to add "narrowing" to our working taxonomy of how courts deal with precedent. Even if Re is right to insist that there is something distinct about "narrowing," in comparison with "overruling" and "distinguishing," might it also be the case that every instance of narrowing can nonetheless still be described using only these two more familiar categories?

Take, for instance, Re's discussion of the Court's treatment of *Flast v. Cohen*, "[o]ne Supreme Court decision [that] has been narrowed more than any other." When first decided, *Flast* was thought by many to open up broad areas for taxpayer standing. But *Flast*'s authorization of taxpayer standing was later narrowed to challenges based on specific constitutional limitations on the taxing and spending power (*Richardson*), then further narrowed to authorize taxpayer standing only for Establishment Clause challenges to certain legislative actions and expenditures (*Valley Forge*, *Hein*), and then narrowed even further to exclude taxpayer standing for Establishment Clause challenges to tax credits (*Winn*). The first decision or two declining to apply *Flast* may have been appropriately described as "distinguishing," but not the entire course of such decisions. It is evident beyond argument that the later decisions changed *Flast*—they narrowed it—and did not simply leave it in place. But it also seems perfectly natural to describe what the Court has done to *Flast* as *partially* overruling it. That is, when the Court has held a different rule to apply in an area previously governed by *Flast*, it has functionally overruled *Flast* with respect to a particular set of applications.

Re argues that "[l]egitimate narrowing is the decisional-law analogue to the statutory-law canon of constitutional avoidance." The analogy holds insofar as both techniques exploit ambiguities to constrain the legal force of one source of legal authority (a precedent or a statute) as a way of giving effect to other legal principles (whether found in other cases or the Constitution or some background source of legal principles). But another, and in some circumstances closer, analogy may be holding a statute partially unconstitutional coupled with statutory severance. After all, as Re puts it elsewhere in the essay, narrowing effects "a partial erasure of decisional law." Following this insight a bit further might lead one to believe that when narrowing ventures beyond strained distinguishing (akin to constitutional avoidance), it becomes partial overruling (akin to partial unconstitutionality plus severance).

One benefit of recognizing the functional equivalence of narrowing and partial overruling in certain circumstances is to highlight what may be an unduly constricted but pervasive misunderstanding of lower-court freedom to narrow Supreme Court precedent. Re's essay understandably brackets off implications for vertical stare decisis; assessing the legitimacy of narrowing by lower courts presents different and harder issues than horizontal narrowing. But by showing that narrowing is common and often legitimate at the horizontal level, the essay's taxonomy at least reveals that it is a mistake to preemptively rule out the possibility of all lower-court narrowing simply by affixing to it the label of partial overruling.

To explore what this might mean for vertical stare decisis, it would be illuminating to run through each of the examples of legitimate narrowing that Re discusses at the Supreme Court level and to inquire whether a lower court would likewise have been free to narrow. That is, would the lower court have complied with governing stare decisis norms by narrowing precedent in the way that the Supreme Court did? If the answer for a given case is "yes," even though the kind of narrowing that the lower court engaged in could easily be understood as an instance of partial overruling (*i.e.*, overruling with respect to a particular set of potential applications), then the principle that lower courts may not anticipatorily overrule an undermined precedent may have a more confined reach than many think. Take, for example, *Hein v. Freedom from Religion Foundation*, in which the Supreme Court held that the taxpayer standing authorized by *Flast* was limited to specific legislative appropriations rather than executive action funded by general discretionary appropriations. This narrowing of *Flast* could be understood as a partial overruling of it. And yet the line adopted by the governing plurality decision is the very line identified and applied by the district court. While the Seventh Circuit reversed this decision (and itself was later reversed in turn), the discussion throughout was about how best to apply the set of cases in the *Flast* line rather than about whether the district court or court of appeals had violated some norm of vertical stare decisis. And that is as it should be.

The practical fluidity of the conceptual boundaries between narrowing a precedent, partially overruling a precedent, and figuring out the best application of a *set* of precedents gives rise to a final observation. The customary way of thinking about how particular judicial decisions change the content of the law is in terms of their effect on particular legal materials like a precedent or a statute, and usually in terms of subtraction. *Narrowing Precedent* sharpens this way of thinking. But using Re's conceptual tools can reveal a different frame altogether, one that is consistent with Re's even while describing changes in the content of the law in a precisely opposite manner.

Re's central concept is the idea of the best reading of a precedent. In his taxonomy, the mirror image of *narrowing* ("not applying a precedent, even though the precedent is best read to apply") is *extending* ("applying a precedent where it is not best read to apply"). The reason that both narrowing and extending can be legitimate practices is that precedents are never best read in isolation from all the other relevant legal materials in a case. The inquiry in every case is what the court has added or should add to the law going forward; only sometimes does this also involve the metaphorical paring back or cutting out of some particular source of law. And even then, there is no conceptual or legal need to describe that removal in terms of excision rather than displacement. For instance, the narrowing of *Flast* is simultaneously the extension of the principles and cases that countervail against taxpayer standing.

The distinction and application of precedents is one of the most fundamental functions of lawyers and judges. *Narrowing Precedent* brings new and welcome clarity to the theoretical understanding of this function. And in the reflection of our newly clarified conceptual lens, we can better understand the jurisprudential truth that the operative

rules and standards in a working legal system are not “the statements found in the texts of constitutions, statutes, and judgments or judicial orders, but . . . the *propositions* which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of the legal system’s other, already valid propositions.” (4 Collected Essays of John Finnis 18-19). For the illumination it offers, one should approach Re’s essay the way that judges and lawyers should approach the law: Read the whole thing!

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